United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7159

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

NO. 75-7159

INTERNATIONAL ELECTRONICS CORPORATION
and ELECTRO MOTIVE CORPORATION,

Plaintiffs

vs.

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER,
SAUL LEWIS, IRVING BEIN, PHILIP BEIN
and J. KEVIN FOLEY;
JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE,
d/b/a APTER, NAHUM & LENGE,

Defendants

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANTS

MORRIS APTER, ESQ.
ARNOLD E. BUCHMAN, ESQ.
101 PEARL STREET
HARTFORD, CONNECTICUT 06103
Attorneys for Appellants

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THE ISSUES PRESENTED FOR REVIEW

First: Did the District Court err in granting plaintiffs' motion to disqualify defendants' counsel?

Second: Did the District Court err in denying defendants' motion to disqualify plaintiffs' counsel?

PRELIMINARY STATEMENT

The decision appealed from was rendered by Honorable M. Joseph Blumenfeld, United States District Judge, District of Connecticut.

STATEMENT OF THE CASE

The complaint, dated June 6, 1974, was issued by Attorney J. Read Murphy of the firm of Murtha, Cullina, Richter and Pinney. It asserts causes of action based upon alleged violations of the Securities Act of 1933, the Securities Exchange Act of 1934, SEC Rule 10(b)-5 promulgated thereunder, common law fraud and breach of contract.

Nine individuals are named as defendants. Seven of them, Joseph Flanzer, John Sinder, Irving Bein, Philip Bein, J. Kevin Foley, Saul Lewis and Julius Apter, are denominated "conspiring" defendants. Complaint, ¶6. The remaining two, Morris Apter and Nicholas A. Lenge, who together with Julius Apter are alleged to be doing business as the law firm of Apter, Nahum & Lenge, are referred to as the Agents of a certain escrow fund and are "named . . . in order that all necessary parties for a proper adjudication of this matter are before this Court." Complaint, ¶7.

On June 20, 1974, Attorney Morris Apter entered his appearance on behalf of all but one of the "conspiring defendants[1] and Attorney Arnold E. Buchman, a partner of Ap-

[1] The "conspiring" defendant J. Kevin Foley retained other counsel and therefore is not involved in the issues presented by this appeal. Consequently, the term "conspiring defendants", hereafter, shall be used to refer to the "conspiring" defendants other than J. Kevin Foley.

ter, Nahum & Lenge, but not named as a defendant, entered his appearance on behalf of the firm.

Thereafter, various stipulations, pleadings and interrogatories were filed so that by the end of September, 1974, the complaint had been answered, counterclaims had been filed, one Benjamin Grossman had been added as a party defendant to one of the counterclaims, Attorney Murphy had entered his appearance on behalf of Grossman and Plaintiffs' first set of interrogatories had been answered. See: Listing of Docket Entries.

During the early part of July, 1974, Attorney Murphy had informed Attorney Morris Apter that plaintiffs' New York counsel were demanding that he, Morris Apter and Attorney Arnold E. Buchman withdraw their appearances from the case. Later reiteration of this demand prompted defendants' motion of October 1, 1974 to disqualify plaintiffs' attorney and plaintiffs' similar motion of October 4, 1974. Appendix, pp. 1-4.

On February 27, 1975, Judge Blumenfeld denied defendants' motion and granted plaintiffs' motion, thereby disqualifying "Julius Apter and the members of the law firm of Apter, Nahum & Lenge from participating in the conduct of the trial of this case . . ." Memorandum of Decision, Plaintiffs' Motion, 2/27/75. Appendix p. 51.

Defendants appeal from these final orders under authority of 28 U.S.C. § 1291. See: *Silver Chrysler Plymouth, Inc. vs. Chrysler Motors Corp.*, 496 F.2d 800 (2nd Cir. 1974)

STATEMENT OF THE FACTS

This litigation arises from a transaction whereby the Electro Motive Manufacturing Company, Incorporated (ELMENCO) merged into IECONN, Inc., predecessor in name to plaintiff Electro Motive Corporation, a wholly

owned subsidiary of plaintiff International Electronics Corporation (IEC). See Complaint.

Plaintiffs claim that defendant Julius Apter, acting as director, officer and a selling stockholder of ELMENCO, took part with defendants Joseph Flanzer and John Sinder, ELMENCO's principal officers, directors and stockholders, in the negotiations which resulted in IECONN's purchase of ELMENCO's outstanding stock The stock purchase arrangements, embodied in a written Agreement, dated April 19, 1973, were consummated on July 27, 1973. On that date, ELMENCO's stockholders received approximately $7 million from IECONN, which, in accordance with the April 19 agreement, paid over an additional $1.02 million to an Escrow Fund under the joint control of plaintiff IEC and Agent defendants Apter, Nahum & Lenge.[2]

As the result of a degenerative eye condition which rendered him unable to read, Julius Apter, who is over 76 years old, practiced law only on a limited basis during the fall and winter of 1973, and since January, 1974 has not engaged at all in the practice of law. He no longer occupies office space in the Apter, Nahum & Lenge offices, no longer resides in Connecticut, has not renewed his Connecticut license to practice law and has not acted as counsel or otherwise participated in the conduct of this case except as a party defendant. Accordingly, he does not make claim to, expect or anticipate any participation in fees to be earned by Apter, Nahum & Lenge for professional services rendered or to be rendered in connection with this lawsuit. Appendix, p. 5.

The complaint alleges that the April 19, 1973 Agreement contains actionable misstatements and omits material facts. Plaintiffs now claim that because of his participation in the negotiations for the April 19 Agreement, the defendant Ju-

[2] There is no claim that members of the law firm of Apter, Nahum & Lenge, as then constituted, other than Julius Apter were in any way involved in the ELMENCO/IECONN transaction other than as such Escrow Agents.

lius Apter will be called upon to testify in the action and that consequently, under the injunction of Disciplinary Rules 5-101(B) and 5-102(A) American Bar Association, Code of Professional Responsibility (See Addendum), Julius Apter's former law partners should be disqualified from appearing on behalf of any defendant in this action. Plaintiffs' Motion to Disqualify, 10/4/74. Appendix, pp. 2-4.

The rights, duties and relationships of attorneys and parties is further confounded by the following factor: On April 9, 1974, prior to the institution of this action, Attorney Morris Apter was appointed by the Probate Court for the District of Hartford as co-executor in the Estate of Samuel Roskin in accordance with a direction contained in Mr. Roskin's Will. Attorney Donald P. Richter of the law firm of Murtha, Cullina, Richter and Pinney, Attorney Murphy's partner, was retained as attorney for the co-executors, including Morris Apter.[3] Richter was acting as such on June 6, 1974, when Attorney Murphy named Morris Apter a defendant in this action, thus occasioning newspaper articles linking Morris Apter with allegations of stock fraud. Attachment to Memorandum in Support of Defendants' Motion to Disqualify 10/15/74. Richter nevertheless continued as such attorney while his partner made a motion to disqualify Morris Apter from participation in this case and filed briefs which alleged Morris Apter's breach of professional ethics, irresponsibly implied that his firm was guilty of champerty, and accused him of attempting to circumvent disciplinary rules of the legal profession.

SUMMARY OF ARGUMENT

While defendants readily concede the validity of the rule militating against an attorney acting as both witness and

[3] Subsequently, one of the three co-executors appointed by the Probate Court resigned leaving Morris Apter as one of two continuing executors.

advocate, they submit that the rule has no application to the present facts where the "attorney" witness, Julius Apter, is not attorney at all, but party defendant, and the counsel for the defendants, who are Julius Apter's former partners, have no connection with the alleged, operative facts such as to render them potential witnesses in this action.

Defendants agree with Judge Blumenfeld that Attorney Richter's engagement as counsel for Morris Apter, co-executor, "cannot possibly have anything to do with the litigation in this case." However, while the relationship of confidentiality between Morris Apter as client and Attorney Richter as lawyer may be remote from the substantive issues of this lawsuit, the attributes of fidelity, confidence, personal trust and good faith which should characterize the relationship of a client and his counsel, have been undermined by the attacks of Richter's law firm on Morris Apter, who, as co-executor, continues to be their client.

I. THE APPEAL FROM THE GRANTING OF PLAINTIFFS' MOTION TO DISQUALIFY DEFENDANTS' COUNSEL.

A. Julius Apter, Morris Apter, and Apter, Nahum & Lenge Are Defendants and As Such Cannot Be Denied The Right to Appear For Themselves

Judge Blumenfeld defined the issue presented by plaintiffs' motion as "whether Julius Apter or any member of the firm of which he is or was a member ought to be permitted to act as counsel at a trial where it is obvious that he will be called to testify as a witness to matters which will be in dispute." Appendix, p. 52.

In considering the issue thus framed, Judge Blumenfeld apparently ignores the fact that Julius Apter's presence in this case arises because he has been made a party defendant. As such, he has the undisputed right of appearing on his

own behalf and conducting his own case. 28 USC § 1654.[4] Yet, the District Court order forbids "Julius Apter . . . from participating in the conduct of the trial of this case." Appendix, p. 55.

Within the breadth of that same order, Judge Blumenfeld denies Morris Apter the right to appear on his own behalf and members of Apter, Nahum & Lenge to appear on its behalf, even though plaintiffs have made Morris Apter and Apter, Nahum & Lenge defendants. These results are further contrary to the statutory right to defend. See: *U. S. vs. Reeves,* 431 F.2d 1187 (9th Cir. 1970).

Consequently, on the strength of 28 USC § 1654 alone, Judge Blumenfeld's order is in error at least insofar as it prohibits Julius Apter and Morris Apter from appearing on their own behalf and members of Apter, Nahum & Lenge from appearing on behalf of the firm.

B. Julius Apter's Statutory Right to Engage Counsel on His Behalf Should Not Be Abridged.

The same statute which gives Julius Apter the unqualified right to appear on his own behalf gives him the alternative right to engage counsel to appear for him. 28 USC § 1654. There is nothing in the statutory language which proscribes a lawyer defendant in a civil action from engaging his former law partners — or for that matter, his present law partners — to appear for him in the litigation.

Defendants, therefore, submit that Judge Blumenfeld's order, insofar as it prohibits defendant Julius Apter from engaging his former partner Morris Apter as counsel in this action, is a denial to Julius Apter of his right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

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[4] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

C. The American Bar Association Code of Professional Responsibility Does Not Bar Morris Apter From Representing His Former Law Partner Julius Apter.

Representation by counsel as provided in 28 USC § 1654 is to be in accordance with the rules of the District Court. *Brasier vs. Jeary*, 256 F.2d 474, 475 (8th Cir. 1958). Judge Blumenfeld notes in his Memorandum that local rule 2(f) "recognizes the authority of the 'Code of Professional Responsibility of the American Bar Association'." (hereafter "Code"). Consequently, it becomes necessary to determine if that Code is applicable to the facts of this case, thereby limiting Julius Apter's statutory right to engage his former partner as counsel.

In support of his decision on plaintiffs' motion, Judge Blumenfeld alludes to the Ethical Consideration 5-9 admonition against lawyer acting as both witness and counsel (see Addendum), and the Disciplinary Rule 5-101(B) injunction against a lawyer accepting employment in litigation if he knows he or a member of his firm ought to be called as a witness.

Both the Consideration and the Rule are offered by the Code in elaboration of Canon 5: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." This language, which became effective October 1, 1972, replaced former Canon 19 which stated, "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client."

Defendants submit that the wording of both the new Canon and the old, the Ethical Considerations, the Discipinary Rules and the cases construing them, demonstrate that the policy to be promoted by these rules cannot be served by

their application to Morris Apter's representation of his former law partner.

Canon 5, its antecedents and its elaborations, are for the benefit of the client. Thus, former Canon 19 is justified because "an attorney who assumes the burden of a witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony." *Lau Ah Yew vs. Dulles,* 257 F.2d 744 (9th Cir. 1958).

Therefore, the client is denied the full force and effect of evidence otherwise presumably untainted by an appearance of self-interest. In Connecticut, the admonition against acting as both witness and advocate "is founded upon our belief that it is unfair to the client that his case should be presented through witnesses whom the trial will necessarily treat as interested, not only through the zeal of advocacy, but also through interest in the result of the trial, instead of as witness without self-interest or other zeal than that of the ordinary witness." *Jennings Co. vs. DiGenova,* 107 Conn. 491, 496 (1928). In this respect, the restriction upon a lawyer acting as both witness and advocate is an ethical restraint propounded to protect the client by preserving to him the full weight of whatever testimony his lawyer has to offer in his behalf undiminished by even the appearance of self-interest.

In furtherance of this ethical imperative, the Connecticut court in *Jennings Co., supra* at 498, 499, and the Code extend the restriction to partners of the witness lawyer for the reason that by attribution, the advocacy interest of the advocate partner would infect the credibility of the witness partner.[5]

If the policy is to protect the client by preserving his lawyer's testimony untainted by the appearance of self-interest,

[5] cf. American Bar Association, Opinions of Committee on Professional Ethics and Grievances, Opinion 220 (7/12/41); "It is not always improper for an attorney to appear in a case in which his partner is a material witness."

is that policy promoted by Judge Blumenfeld's order? Defendants contend that it is not. A description of "conspiring" defendant Julius Apter's status in this case makes that clear.

Julius Apter has not entered his appearance in this action on behalf of anyone. He no longer practices law, being physically unable to do so. He has neither expectation nor entitlement to professional fees earned or to be earned in this case. In no way can Julius Apter, himself, be deemed advocate within the fair meaning of any ethical rule or prohibition.

He is, however, very much a part of this case, having been made a defendant, accused individually, and alleged personally liable in a suit sounding in fraud and claiming $2 million damages. If and when he is called upon to testify, the trier, perforce, will recognize Julius Apter as a witness with a real, immediate and personal interest in the outcome of the action; an interest so apparent that no one need fear any possible further taint, through attribution to him of any advocate zeal.

It may fairly be assumed that this suit, with its allegations of fraud and its claims for millions, is of some moment to Julius Apter, as well as the other defendants. Prompted by his natural concern, Julius Apter has engaged his former law partner to conduct his defense. But even if Julius Apter were not retired, even if he then retained a present partner to defend him, it is nonsensical to suggest that the credibility to be accorded Julius Apter, party-witness, could be diminished by one iota through a theory of attributed "advocate" interest because his partner was handling the trial.

The theory of advocate-interest-by-attribution becomes even more tenuous considering that Julius Apter is not being represented by his partner, but rather by his former partner. There is no more reason to deny Julius Apter the representation of his former partner than there would be to

deny a parent the right to hire his attorney son or a wife her attorney husband. As with a filial or marital nexus, a former law partnership of many years can inspire a confidence in the attorney which is the due of every client.

According to the commentators, the "advocate-interest" premise is not so much bottomed upon a fear that lawyer-witness will distort the truth in favor of his client as it is upon the assumption that the public will presume as much. See: 6 *Wigmore on Evidence* § 1191 (3rd ed. 1940). But whether the advocate-witness prohibition is founded on fear of distortion in a client's favor, or the appearance of such distortion, Julius Apter has no client for whom he can be imagined to distort the truth; he is in this case because of his own plainly identified self-interest.

Perhaps collateral to what might be described as this "public image" aspect of the rule prohibiting lawyer from acting as both witness and advocate, is that portion of Ethical Consideration 5-9 quoted by Judge Blumenfeld, which states that "opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case." Again, Julius Apter can be considered advocate only by attribution to the appearance filed by his former law partner. In terms of Ethical Consideration 5-9, the handicap, if any, which opposing counsel faces in challenging Julius Apter's credibility arises from the fact that he is a retired lawyer and would be the same handicap in any event.

A fair reading of the cases, commentators and the Code makes apparent that the witness role envisioned by the advocate-witness prohibition, is that of a witness uninvolved in the issues and unconnected to the outcome; one, who at common law would not have been disqualified by reason of interest. Since the ethical concerns are more with the appearance than the actuality of a "common law" disqualifying interest, lawyers are constrained to avoid situations where

their testimony is presumptively suspect by force of their status as advocate. 6 *Wigmore* op. cit. But where the lawyer who is to testify is not a witness in the common law sense, but rather because he is a party to the action — a role which at common law would automatically disqualify him from being a witness[6] — all allusion of disinterest is immediately dispelled.

Because of the inherent nature of Julius Apter's status in this case, there is no semblance of disinterest which can or should be preserved to him. The mere accident that he was, by profession, a lawyer, does not make pertinent a rule designed to safeguard the semblance of a non-party lawyer's disinterest. Yet, this motion somehow has turned upon the potential testimony of Julius Apter and the presumed discrediting effect which the advocacy of his former partner may have upon it; a theoretical discredit resulting from the interest engendered in the advocacy and imputed to the testimony. This proposition becomes Kafkaesque when it is remembered that Julius Apter's potential testimony is already and by definition infused with the ultimate degree of self-interest imaginable under the common law. Denying Julius Apter his right to be represented by his former partner, on the basis of Ethical Consideration 5-9 and Disciplinary Rule 101(B), makes as much sense as dusting a coal lump to make it less black.

There is no breach of any policy consideration reasonably within the contemplation of the Code which might justify the abridgement of Julius Apters' statutory right to engage counsel of his own choice in his defense of this action. Insofar as Judge Blumenfeld's order disqualified Morris Apter from representing his former partner Julius Apter, that order is arbitrary, capricious and unwarranted.

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[6] *Wright vs. Wilson*, 154 F.2d 616 (3rd Cir. 1946).

D. Julius Apter's Former Law Partner Should Not Be Disqualified From Representing Other "Conspiring" Defendants.

Judge Blumenfeld's order disqualified Morris Apter from representing the other "conspiring" defendants, as well as Julius Apter. Again, the only factual basis for this disqualification is that Julius Apter, the potential party-witness, is Morris Apter's former law partner.

Regarding this relationship, Judge Blumenfeld quoted, with emphasis, language from *Jennings Co. vs. DiGenova, supra:* "The rule of prohibition for the inactive partner, as for the active partner, is for his own protection, not because the court thinks that he, in either case, will in fact often be exposed to temptation, but to avoid the appearance of wrongdoing."[7] Appendix, p. 56.

The rule, then, is for the purpose of avoiding the appearance of wrongdoing arising from the factual situation where lawyer testifies on behalf of client in a trial conducted by lawyer's partner, the presumed effect being as if advocate partner himself has taken the stand.

But, as a simple matter of fact, Julius Apter is not trial counsel's partner; Julius Apter has no client in this case; Julius Apter is in this case only because plaintiffs have made him a defendant and accused him of wrongdoing. As a simple matter of fact, Julius Apter has not accepted employment in contemplated or pending litigation wherein he knew or it is obvious that he ought to be called as a witness. As a simple matter of fact, Morris Apter has not accepted employment in contemplated or pending litigation wherein he or a lawyer in his firm ought to be called as a witness.

Julius Apter's testimony would be given as one of the

[7] The court uses the term "inactive partner" to describe the witness testifying on behalf of the firm's client as opposed to the "active partner" who actually tries the case in court. *Jennings Co.* does not involve, as here, a partner who has retired from the firm.

"conspiring" defendants, and its effect upon their common cause can in no way be increased or diminished by the mere fact of Morris Apter's advocacy. Morris Apter's advocacy on behalf of any one or more of the "conspiring" defendants cannot, in any way cognizable under the Code, affect the weight and credibility to be accorded Julius Apter's testimony. The other conspiring defendants are linked to the testimony of Julius Apter through their common cause against plaintiffs' allegations, and not by some mystical construct which casts the stain of "advocacy" on all, through invocation of the magical words "lawyer" and "witness".

Judge Blumenfeld's order, insofar as it disqualifies Morris Apter from representing any of the "conspiring" defendants, is premised upon a conclusion without factual basis. In fact, neither he nor any member of his law firm is a potential witness in this case.

E. There is No Appearance of Impropriety Sufficient to Justify Disqualification of Defendants' Counsel

This court has stated that "application of a strictly prophylactic rule" is justified to prevent even the slightest possibility that confidential information obtained from a former client, later, could not be used against him. *Emle Industries, Inc. vs. Patentex, Inc.*, 478 F.2d 562, 571 (2nd Cir. 1973). But, even this stringent ethical rule is not to be applied arbitrarily since "the danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification." *Silver Chrysler Plymouth, Inc. vs. Chrysler Motors Corp.*, 370 F. Supp. 581 (S.D. N.Y. 1973).

It should be remembered that plaintiffs' motion could not have been made but for the fact that Julius Apter is a lawyer, albeit retired. In a different ethical context, this court recently cautioned against reading ethical provisions so

broadly as to eviscerate the right of self-defense. *Meyerhofer vs. Empire Fire and Marine Inc. Co.*, 497 F.2d 1190, 1196 (2nd Cir. 1974). Defendants suggest that the sentiment expressed in *Meyerhofer* is applicable here to former attorney Julius Apter, who, in aid of his defense against charges of fraud, has enlisted the services of his former law partner. "The courts must be cautious not to interfere needlessly with the freedom of litigants to proceed with counsel of their own choice." *Silver Chrysler Plymouth, Inc. vs. Chrysler Motors Corp.*, 370 F. Supp. 581 (S.D. N.Y. 1973).[8]

II. THE APPEAL FROM DENIAL OF DEFENDANTS' MOTION TO DISQUALIFY

A. Defendant Morris Apter As Co-executor of a Probate Estate Is Represented by Plaintiffs' Counsel.

As stated by Judge Blumenfeld in his Ruling, defendants' motion to disqualify plaintiffs' counsel is rooted in the fact that Morris Apter, named as a defendant in the action, is represented in his capacity of co-executor of the Estate of Samuel Roskin by Attorney Donald Richter, a law partner of plaintiffs' counsel. Appendix, p. 57. Judge Blumenfeld dismisses this as a basis for disqualification for the reason that "a relationship of confidentiality between Mr. [Morris]Apter as a client and Mr. Richter as his attorney

[8] In *Emle Industries, Inc. vs. Patentex, Inc.*, supra, this court recognized (but did not apply) the rule enunciated in *Marco vs. Dulles*, 169 F. Supp. 622, 623 (S.D. N.Y., 1959) that a motion to disqualify counsel being equitable in nature, should be made with reasonable diligence and promptness after the facts have become known. Plaintiffs here were aware, even before actual institution of suit, that the Defendants or some of them, would be represented by Morris Apter. They certainly were aware of this fact through the months of June, July, August and September, 1974, when opposing counsel joined in various stipulations and served pleadings upon one another. Defendants submit that the timing of plaintiffs' motion to disqualify is at least as consistent with a tactic of harassment as it is with a concern for ethical proprieties. See: *Galarowicz vs. Ward*, 119 (Utah 611, 620 (1951). This "apparent" use of ethical rules for tactical reasons is potentially more damaging to the legal profession's public image, than is the prospect of a retired lawyer, accused of fraud, being permitted to engage his former partner as counsel in his defense.

is ingenious, but too remote to be relevant. As it happens, Mr. Richter is engaged on a matter which cannot possibly have anything to do with the litigation in this case." Appendix, pp. 57-58.

By his references to the lack of substantive connection with the present litigation, Judge Blumenfeld obviously had in mind this court's expressed concern with the ethical duty of confidentiality owed by a lawyer to his former client. To guard against even the appearance of a breach in that duty, this court has held a lawyer cannot represent a party in a suit against a former client if in his former representation the lawyer could possibly have had access to confidential information at all connected to the new litigation. *Emle Industries, Inc. vs. Patentex, Inc. supra.*

Defendants agree with Judge Blumenfeld's conclusion that Richter's representation of co-executor Morris Apter can have no substantive connection to the issues in this case involving Morris Apter, defendant. However, defendants contend that so long as the attorney-client relationship continues between Richter and Morris Apter, Richter's obligation and duty to his client extends beyond "confidentiality".

B. Morris Apter As Co-executor Is Plaintiffs' Counsel's Client

Judge Blumenfeld states that "Mr. Richter is acting as attorney for the estate — not for Mr. Apter. It is the estate's interest, not Mr. Apter's which is at stake in the [probate] proceeding . . ." Appendix, p. 58. Judge Blumenfeld is wrong.

A probate estate is not a legal entity. 2 Locke and Kohn, *Conn. Probate Practice* § 375 (Boston, 1951). The executor transacts the business of the estate, employing agents (including attorneys) as he sees fit, on his own credit. *Taylor vs. Mygatt,* 26 Conn. 184, 190 (1857). Although, in effect,

the executor reimburses himself from estate assets, obligations incurred by him and not allowed from the estate remain his personal liability. He is personally liable for interest due to a legatee by reason of his failure to adequately perform his executor duties. *Cleary vs. Estate of White,* 134 Conn. 367, 370 (1948). He can be personally bound by deed covenants which he makes as executor. *Belden vs. Seymour,* 8 Conn. 18, 24 (1830). He is personally liable for payment of Connecticut succession taxes (§ 12-384 Conn. Gen. Stats. [1958] and Connecticut estate taxes § 12-392 Conn. Gen. Stats. (1958). He is personally liable for federal estate taxes. §§ 2002, 2203 I.R.C.; 31 USC § 192. To say that Richter acts for the estate's interest and not Morris Apter's, is to state a conceptual impossibility and to ignore practical reality. If Richter is not protecting Morris Apter and the other co-executor of the Roskin estate, he is acting either in ignorance of the law or under false pretenses.

There can be no real question that the relationship of attorney to client exists between Richter and Morris Apter.

Consequently, the question on defendants' motion to disqualify plaintiffs' counsel does not turn upon the actual or possible breach of confidentiality between lawyer and former client. Rather, it depends upon whether a law firm can represent a party suing another present client of the firm.

C. An Attorney Owes a Duty of Loyalty to His Client

The relationship of attorney to client is characterized by terms such as fidelity and good faith, personal trust and confidence. See: *Littleton vs. Kincaid,* 179 F.2d 848, 857 (4th Cir. 1950).

The principles involved were enunciated by the Connecticut Supreme Court in *Grievance Committee vs. Rottner,* 152 Conn. 49 (1964). That case involved a suit instituted by a member of a law firm on behalf of a client, against an in-

dividual who was represented, at the same time, by that firm. The client-defendant complained to the Bar Grievance Committee which presented the matter to the Superior Court.

The firm's connections with the complaining client-defendant were tenuous in any real sense. They had handled two or three insubstantial matters in the course of several years. The last such matter, for which the firm had received no retainer, concerned a small collection claim against an apparently judgment-proof debtor. That matter still remained open when the firm instituted suit against the complaining client on behalf of another client.

As reported in the Supreme Court opinion, the trial court had "concluded that a firm may not accept any action against a person whom they are presently representing, even though there is no relationship between the two cases." op. cit. 65. The trial court had cited with approval an opinion of the New York County Lawyers' Association, Ethics Committee, which held " '. . . while under the circumstances . . . there may be no actual conflict of interests . . . maintenance of public confidence in the Bar requires an attorney who has accepted representation of a client to decline, while representing such client, any employment from an adverse party in any matter, even though wholly unrelated to the original matter' ". op. cit.

The Connecticut Supreme Court concurred. "We feel this rule should be rigidly followed by the legal profession. When a client engages the services of a lawyer in a given piece of business, he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion . . . [otherwise] the profession is exposed to the charge that it is interested only in money." op. cit.

The concern expressed by the court in *Rottner* is echoed by the Code in its Ethical Consideration 5-1: "The profes-

sional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties . . . [T]he interests of other clients . . . should [not] be permitted to dilute his loyalty to his client."

The prohibition against a lawyer suing his own client, as expressed in *Rottner,* is absolute. Although Morris Apter wears a fiduciary hat in his capacity of executor of the Roskin estate, beneficiaries of the estate look to the man, not the hat. If they read the newspapers, they know that Morris Apter has been named as a Defendant in this case, which charges fraud.

Beneficiaries seeing the news reports of this case are likely to draw negative inferences from the fact that the executor of the estate in which they are interested, is named as a defendant in an action claiming fraud. It is bad enough that, through the vagaries of practice, Morris Apter could have been named in this suit no matter who signed the complaint. It is worse still that the complaint issues from the office of an attorney representing him, albeit in an entirely separate matter.

Unfortunately, plaintiffs' counsel have seen fit in this case to charge Morris Apter, if only vicariously,[9] with champerty and to strongly urge that he is unable to exercise reasonable professional judgment in the conduct of this litigation. Plaintiffs' Memorandum in Support of Motion to Disqualify Defendants' Attorney (October 4, 1974). See: *Dukes vs. Warden,* 161 Conn. 337, 345 (1971). These allegations, which are addressed to the attorney as an individual, and not to the merits of his clients' cause, obviously have a chilling effect upon the relationship of Morris Apter, Executor, and

[9] A logical correlation to Judge Blumenfeld's apparent application of the *Jennings Co. supra* interest-by-attribution rule in suport of his decision granting plaintiffs' motion would be a slur-by-attribution rule. By their explicit charges of fraud and their implicit accusations of champerty directed against Julius Apter, plaintiffs' counsel, under such a rationale, are accusing their client Morris Apter of similar crimes.

the firm of Murtha, Cullina, Richter and Pinney. It is not in accord with the "utmost good faith" to which Morris Apter as client of that firm is entitled. *Hafter vs. Farkas,* 498 F.2d 587 (2nd Cir. 1974).

The office of fiduciary in an estate — especially in an estate as substantial and involved as the Roskin estate — carries a great burden of responsibility. At minimum, the fiduciary should be able to feel confident in the advice and support of his counsel, whether or not the fiduciary is himself a lawyer. That confidence can only be undercut when his counsel's firm directs attacks against him personally, even though in a wholly different context. "The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously." *In re National Discount Corp.,* 197 F. Supp. 505, 506 (W.D. S.C., 1961).

In this context, it is meaningless to discuss as distinct, the roles of "agent defendant" and "counsel for defendants," when these offices are filled by one individual and that individual is personally attacked by the firm representing him in his office as executor. "The attorney is under a duty to represent his client with the 'utmost degree of honesty, forthrightness, loyalty and fidelity.' He must resign if at any time in the course of litigation his interest in the suit becomes 'adverse or hostile to his client.' Hostility or adverse positions need not always be of an economic character." *Singleton vs. Foreman,* 435 F.2d 962, 970 (5th Cir. 1970). Being a lawyer himself does not deprive Morris Apter of the rights and reasonable expectations described in *Rottner,* which he has as the client of an attorney.

As already noted, it is entirely possible (although not necessarily so) that Morris Apter would have been named as a defendant by any attorney representing these plaintiffs in this matter. But this possibility does not obviate, or even mitigate, the undermining effect which the course of this

action, as directed against Morris Apter, has had on the present, pre-existing relationship between Morris Apter, Executor, and Murtha, Cullina, Richter and Pinney, as attorneys for the Executors. It is of no relevance that this action could have followed precisely the same course if conducted by other counsel for the Plaintiffs. Had it been so conducted by other counsel, there would have been no occasion for strain in the pre-existing and continuing relationship between executor and his lawyer.

III. CONCLUSION

The ethical considerations which restrict a lawyer from acting as both witness and advocate for his client do not pertain to the present case where Julius Apter, the potential witness, is counsel for no one, but appears only because he is a defendant in the action. As a defendant, Julius Apter, along with the other defendants, is entitled to engage his former law partner to represent him.

For these reasons, Judge Blumenfeld's order disqualifying defendants' counsel should be vacated.

The duty owed by a lawyer to his client extends beyond the keeping of confidences. While the attorney-client relationship continues, the attorney also owes the client loyalty and good faith. Defendant Morris Apter is the client of plaintiffs' counsel. The allegations leveled against him in this proceeding are inconsistent with the loyalty owed him by his counsel, albeit counsel in a separate matter.

For these reasons, Judge Blumenfeld's denial of defendants' motion to disqualify plaintiffs' counsel should be reversed.

ADDENDUM

Disciplinary Rule 5-101 (B)

A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Disciplinary Rule 5-102 (A)

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

Ethical Consideration 5-9

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a

lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.